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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.02.2007

CORAM

THE HON'BLE MR.JUSTICE P.D.DINAKARAN
AND
THE HON'BLE MRS.JUSTICE CHITRA VENKATARAMAN

T.C.(A).No.74 of 2007

Commissioner of Income Tax,
coimbatore. .. Appellant

Vs.

M/s.Shiva Distilleries Ltd.,
252, Mettupalayam Road,
coimbatore. . .. Respondent

Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, 'D' Bench, Chennai dated 13.1.2006 in ITA No.1430/Mds/2003 for the assessment year 2000-2001 (ITA.No.60/02-03 dated 4.4.2003 on the file of the Commissioner of Income-Tax (Appeals) I Coimbatore against PAN/GIR.No. 5-53,49-502-CZ-2367 dated 26.3.2002 on the file of the Assistant Commissioner of Income-Tax Company Circle -I (2), Coimbatore)

For Appellant : Mr.J.Nareshkumar

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J U D G M E N T

(Delivered by P.D. DINAKARAN, J.)

The above tax case appeal is directed against the order of the Income-tax Appellate Tribunal in ITA No.1430/Mds/ 2003, dated 13.1.2006, raising the following substantial questions of law.

> 1. Whether on the facts and in the circumstances of the case, the Income-tax Tribunal is right in law in allowing the expenditure on replacement of machinery as revenue expenditure and not capital?
>
> 2. Whether on the facts and in the circumstances of the case, the Income-tax Tribunal is right in law in holding that the scrap and waste materials generated during the course of manufacture, royalty received and

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the guarantee commission for the purpose of calculation of 80HHC deduction would have to be excluded from business profit for the purpose of calculation of deduction under 80HHC?

3. Whether on the facts and in the circumstances of the case, the Income-tax Tribunal is right in law in holding that excise duty and sales tax are to be included in the turnover while calculating 80HHC deduction?

2. As the 3rd question, ex facie, is not happily worded, we reframe the same as under:

Whether on the facts and in the circumstances of the case, the Income-tax Tribunal is right in law in holding that excise duty and sales tax are not to be included in the turnover while calculating 80HHC deduction?

3. The Revenue is the appellant. During the previous year relevant to the assessment year, the assessee replaced certain machinery and claimed the said expenditure as revenue expenditure, but the assessing officer treated the same as capital expenditure. The assessing officer rejected the claim of the assessee for the exclusion of waste and scrap material generated during the course of manufacture, royalty received and guarantee commission for the purpose of calculation of deduction under section 80HHC of the Income-tax Act, 1961 (in short, 'the Act'). The Assessing Officer also included excise duty and sales tax collection to the total turnover, while calculating deduction under Section 80 HHC of the Act.

4. Against the said order, the assessee filed an appeal before the Commissioner of Income Tax (Appeals), who decided the issue of inclusion of sales tax and excise duty for the purpose of deduction under section 80 HHC of the Act in favour of the assessee and dismissed the appeal in respect of other issues.

5. On appeal at the instance of the Revenue, the Income Tax Appellate Tribunal, remitted the issue of replacement of machinery to the Assessing Officer to decide the issue on the basis of materials. So far as scrap and waste materials generated during the course of manufacture, royalty and guarantee commission are concerned, the Appellate Tribunal decided the issue in favour of the assessee. The Appellate Tribunal also decided the issue of inclusion of excise duty and sales tax to the total turnover in favour of the assessee. Aggrieved by the same, the Revenue has preferred this appeal raising the questions of law referred above.

6.1. As regards the 1st question, the issue whether the expenditure on

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replacement of machinery is capital or revenue is not determined by the treatment given in the books of account or in the balance sheet. The claim has to be determined only by the provisions of the Act and not by the accounting practice of the assessee.

6.2. This Court, in COMMISSIONER OF INCOME-TAX v. JANAKIRAM MILLS LTD. (2005) (275 ITR 403), held that all plant and machinery put together amount to a complete spinning mill which is capable of manufacturing yarn and hence, each replaced machine could not be considered as an independent one and no intermediate marketable product was produced.

6.3. In the instant case, to find out the nature of the new machinery, the Appellate Tribunal remanded the issue to the Assessing Officer. In our considered opinion, the Revenue is not, in any way, aggrieved by the remand of the issue, which is only to find out the fact. Accordingly, we do not find any error in the order of the Tribunal in remanding the matter to the Assessing Officer.

7.1. With regard to the 2nd question, it deals with scrap and waste materials generated during the course of manufacture, royalty received and guarantee commission.

7.2. With respect to the scrap and waste materials generated during the course of manufacture, it is useful to refer the decision of this Court in C.I.T. v. Madras Motors/M.M.Forgings Ltd. (257 ITR 60) where it was held that the turnover from the business of sale of motorcycles, motorcycle spare parts and television sets could not be included in the total turnover of the assessee for the purpose of computation of deduction under section 80HHC of the Act as the total turnover in section 80HHC is only the turnover relating to export business of the assessee and not the turnover relating to other business of the assessee.

7.3. Applying the ratio laid down by this Court in C.I.T. v. Madras Motors/M.M.Forgings Ltd. (257 ITR 60), we hold that the scrap and waste materials, which would not be relatable to export business of the assessee, have to be excluded from business profit for the purpose of calculation of deduction under section 80HHC of the Act.

7.4. On the question of includibility of royalty as well as the guarantee commission for the purpose of calculation of deduction under section 80HHC of the Act, the Bombay High Court in Commissioner of Income-tax (Appeals) v. Bangalore Clothing Co. (260 ITR 0371) held that the Explanation (baa) to section 80HHC of the Income-tax Act, 1961, was inserted by the Finance (No. 2) Act, 1991, with effect from April 1, 1992 and under that Explanation, “profits of the business”, for the purposes of section 80HHC does not include receipts which do not have an element of turnover like rent, commission, interest, etc. This Court in C.I.T. v. Sundaram Clayton Ltd. (281 ITR 425) also held that the charges of miscellaneous income and commission do not form part of the turnover for the purpose of calculation of deduction under section 80HHC of the Act.

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Applying the above ratio to the facts of the case, we are of the view that the guarantee commission as well as royalty, viz., a payment for using a right, have to be excluded from the business profit for the purpose of calculation of deduction under section 80HHC of the Act.

8.1. With regard to the 3rd question as reframed, viz., whether the excise duty and sales tax are not includable in the turnover while calculating the deduction under Section 80HHC, this Court in COMMISSIONER OF INCOME TAX VS. WHEELS INDIA LTD. (275 ITR 319) and COMMISSIONER OF INCOME TAX VS. SUNDARAM FASTENERS LTD.(272 ITR 652), which were followed by this Court in COMMISSIONER OF INCOME-TAX VS. INDIA PISTONS LTD. (282 ITR 632), held that it is highly impossible to accept the contention that the term 'turnover' would include the excise duty and sales tax components which are all indirect taxes and which the assessee has to collect and pay over to the Government and such statutory dues will not have any element of profit of business and therefore, the sales tax and excise duty are not to be included in the total turnover while computing the deduction under Section 80HHC of the Act.

8.2. In view of the ratio laid down by this Court in the decisions cited supra, we hold that the sales tax and excise duty are not to be included in the total turnover, while computing the deduction under Section 80HHC of the Act.

Therefore, finding no substantial questions of law that arise for our consideration, the appeal is dismissed.

kpl/na

Sd/-
Assistant Registrar,

/true copy/

Sub Assistant Registrar.

To

1. THE ASSISTANT REGISTRAR
INCOME TAX APPELLATE TRIBUNAL,
RAJAJI BHAVAN III FLOOR,
BESANT NAGAR, CHENNAI -90

2. THE COMMISSIONER OF INCOME TAX
APPEALS I, COIMBATORE.

3. THE COMMISSIONER OF INCOME TAX
COIMBATORE.

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4. THE ASSISTANT COMMISSIONER
OF INCOME TAX, COMPANY CIRCLE I (2)
COIMBATORE.

+ One cc to Mr. N. Murali kumaran,
Senior Standing Counsel for IT SR.No. 9148

JRG (co)
sg 16/3/07

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